Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

STATE OF MINNESOTA,
Petitioner,

v.

DANON JASON RUSSELL,
Respondent.

Petition For Writ Of Certiorari
To The Court Of Appeals Of Minnesota

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Police obtained a search warrant for defendant/respondent Danon Russell's DNA, to compare it to the DNA found on a gun that a witness saw Russell handling. The witness did not know Russell's name; police obtained his name in a stop that was later held illegal. Under *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984), and the exclusionary rule, is police knowledge of a suspect's identity suppressible if the knowledge came from an illegal stop?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Minnesota, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Minnesota Court of Appeals in this case.

OPINION BELOW

The opinion of the Minnesota Court of Appeals is unpublished. *State v. Russell*, 2009 WL 2151098 (Minn. Ct. App. 2009); Appendix ("App.") 1. The Minnesota Supreme Court denied the state's petition for further review on September 29, 2009.

JURISDICTION

The Minnesota Court of Appeals issued its decision on July 21, 2009; judgment was issued on October 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents a question under the Fourth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On August 4, 2006, police went to a "problem property" where numerous arrests had been made. They arrested Benjamin Danielski for possession of methamphetamine, and found a gun in his car. An officer stopped defendant/respondent Dannon Russell – who had earlier hurried into the house when officers arrived – to get his name. Russell gave a fake name, and a birth date that did not match how old he said he was. Handcuffed, he admitted his real name and that there were outstanding warrants for his arrest.

Danielski later told police he had seen Russell with the gun. Police applied for a search warrant to obtain Russell's DNA. Minnesota Judge of District Court William H. Leary, III found probable cause and issued the warrant. Tests showed that Russell's DNA profile was the predominant profile on the gun.

Charged with possession of a firearm by an ineligible person, Russell argued that the police illegally stopped him and that the search warrant for his DNA was not supported by probable cause. Minnesota District Court Judge James H. Clark, Jr., denied Russell's motion to suppress. A jury trial resulted in Russell being found guilty, and sentenced to the mandatory minimum 60-month term.

On direct appeal, the Minnesota Court of Appeals reversed. It held that the police stop of Russell was unlawful, but for the stop the officers would not have learned Russell's identity, and without knowledge of his identity the officers could not have obtained a search warrant for his DNA, so the DNA evidence

must be suppressed. It rejected the state's argument that under *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984), and the exclusionary rule, knowledge of identity cannot be suppressed. *State v. Russell*, 2009 WL 2151098 (Minn. Ct. App. July 21, 2009); App. 1, 7-11. On September 29, 2009, the Minnesota Supreme Court denied the state's petition for further review.

REASONS FOR GRANTING THE PETITION

This case presents this Court with an opportunity to answer a recurring, important question on which lower courts are split: Is identity-related evidence suppressible? The answer to this question depends, at least in part, on the proper interpretation of the following oft-debated language in *I.N.S. v. Lopez-Mendoza*: "[t]he 'body' or *identity* of a defendant or a respondent in a *criminal* or civil proceeding *is never itself suppressible as a fruit of an unlawful arrest* . . .." 468 U.S. 1032, 1039 40 (1984) (emphasis added). The Fourth Circuit Court of Appeals has noted that the "meaning of the *Lopez-Mendoza* 'identity statement' has bedeviled and divided our sister circuits." *United States v. Oscar-Torres*, 507 F.3d 224, 228 (4th Cir. 2007).[1]

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[1] The state is not seeking review of the validity of the stop here, which just involves the application of well-established law to unique facts. If this Court grants review and reverses the court of appeals, it would be appropriate to remand for determination of whether the search warrant application established probable cause, an issue the court of appeals did not reach. App. 11.

The majority, but not all, of the federal circuits have rejected the Minnesota Court of Appeals' erroneous conclusion that knowledge of identity is subject to suppression. These courts have either held that *Lopez-Mendoza* means what it says – that the identity of a defendant in a criminal case is never itself suppressible – or that knowledge of identity is otherwise not subject to the exclusionary rule. *See United States v. Bowley*, 435 F.3d 426 (3rd Cir. 2006); *United States v. Navarro-Diaz*, 420 F.3d 581 (6th Cir. 2005); *United States v. Del Toro Gudino*, 376 F.3d 997 (9th Cir. 2004), *cert. denied*, 543 U.S. 1170 (2005); *Navarro Chalan v. Ashcroft*, 359 F.3d 19 (1st Cir. 2004); *United States v. Roque Villanueva*, 175 F.3d 345 (5th Cir. 1999); *United States v. Adegbite*, 846 F.2d 834 (2nd Cir. 1988), *cert. denied*, 493 U.S. 956 (1989); *see also, e.g., People v. Cobb*, 703 N.Y.S.2d 341 (N.Y. Crim. Ct. 1997); *People v. Panfili*, 145 Cal. App. 3d 387 (Cal. Ct. App. 1983).

The Minnesota Court of Appeals – relying on cases from the 8th, 10th, and 11th Circuits – concluded that *Lopez-Mendoza* simply stands for the legal principle that "illegal police activity does not affect the court's jurisdiction or require dismissal of the prosecution, but illegal police activity may affect the admissibility of evidence." App. 10-11 (citing *United States v. Farias Gonzalez*, 556 F.3d 1181 (11th Cir. 2009); *United States v. Olivares-Rangel*, 458 F.3d 1104 (10th Cir. 2006); *United States v. Rodriguez-Arreola*, 270 F.3d 611 (8th Cir. 2001)); *see also, e.g., Oscar-Torres*, 507 F.3d 224 (4th Cir. 2007); *United States v. Mendoza-Carrillo*, 107 F. Supp. 2d 1098 (D.S.D. 2000). The court concluded that, "although identity itself is not

suppressible, evidence of identity is suppressible. Here, [Russell's] statement made after his unlawful seizure is evidence of his identity. Because this statement is a fruit of the poisonous tree, the district court erred by not suppressing the statement." App. 11.

The flaw in the court's rejection of *Lopez-Mendoza* is that the officers' stop of Russell did not yield any evidence to be used against him; it just resulted in the officers learning his identity. The state has never attempted to introduce any physical evidence obtained at the time of the stop or the substance of any statements Russell made. The probable-cause portion of the search warrant that yielded Russell's DNA does not contain any evidence obtained from the stop. The stop simply provided the police with knowledge of Russell's identity.[2]

It is clear that Fourth Amendment violations cannot serve to shield someone from prosecution when identity was discovered during the course of the stop. See *United States v. Crews*, 445 U.S. 463, 474 (1980) (holding that illegal arrest is not a bar to prosecution, and that a person is not himself evidence that can be

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[2] Russell has consistently argued that the issue here "is no different than any other challenged piece of evidence the police acquired only by violating a defendant's Fourth Amendment right." Response in Opposition to the State's Petition for Further Review at 6. Russell ignores that nothing in his statement to the police was used against him; the statement just provided the police with knowledge of his identity. If Russell is tried, the state will not need to mention the stop at all; it will simply have to prove that Russell is ineligible to possess a firearm, and that he did so, as evidenced by the DNA found on the gun and Danielski's statement that he saw Russell holding the gun.

suppressed). The most logical reading of *Lopez-Mendoza and Crews* is that knowledge of identity is not suppressible. *See, e.g., Navarro-Diaz*, 420 F.3d at 585 88). As the Third Circuit Court of Appeals has stated, it is unlikely that this Court would lightly use the sweeping language in *Lopez-Mendoza* that the identity of a defendant in a criminal proceeding "is never itself suppressible." *Bowley*, 435 3d at 430.

Further, numerous courts have held that the existence of an outstanding arrest warrant dissipates any taint from an illegal initial detention; these arrest-warrant cases illustrate the principle that knowledge of identity is not subject to suppression. *See, e.g., United States v. Green*, 111 F.3d 515 (7th Cir.) ("It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant – in a sense requiring an official call of 'Olly, Olly, Oxen Free.'"), *cert. denied*, 522 U.S. 973 (1997); *State v. Walker-Stokes*, 903 N.E.2d 1277 (Ohio Ct. App. 2008); *People v. Reese*, 761 N.W.2d 405 (Mich. Ct. App. 2008); *McBath v. State*, 108 P.3d 241 (Alaska Ct. App. 2005); *People v. Murray*, 728 N.E.2d 512 (Ill. Ct. App. 2000); *State v. Hill*, 725 So.2d 1282 (La. 1998); *Ruffin v. State*, 412 S.E.2d 850 (Ga. Ct. App. 1991); *Reed v. State*, 809 S.W.2d 940 (Tx. Crim. App. 1991); *State v. Lamaster*, 652 S.W.2d 885 (Mo. Ct. App. 1983); *People v. Hillyard*, 589 P.2d 939 (Colo. 1979); *State v. Rothenberger*, 440 P.2d 184 (Wash. 1968). There is no principled basis for a holding that illegally-obtained knowledge of identity can be used to make an arrest on an outstanding warrant, but cannot be used to put a name on a search warrant.

In *Farias-Gonzales*, a case relied on by the court of appeals, the Eleventh Circuit explained that:

> [A]llowing a criminal defendant to use the exclusionary rule to exclude evidence of his identity achieves the same result as would allowing him to suppress the court's jurisdiction over him. While Farias-Gonzalez does not seek to prevent the court from summoning him before it, he does seek to prevent the Government from showing who he is when he appears before it. If Farias-Gonzalez can suppress the Government's evidence of who he is, then he has accomplished the same thing he would have accomplished had he suppressed the ability of the court to exercise jurisdiction over him.

556 F.3d at 1188. Similarly, preventing the state from putting Russell's name on a search warrant effectively suppresses jurisdiction over him.[3]

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[3] Russell may argue that exclusion is necessary to deter violations of the Fourth Amendment. The Eleventh Circuit has persuasively rebutted such an argument: "[C]ivil suits provide deterrence for searches and seizures that violate the Fourth Amendment. Since identity-related evidence is collectible without implicating the Fourth Amendment, Fourth Amendment violations will only occur when there is an unconstitutional search or seizure prior to the collection of the identity-related evidence. Thus, officers seeking to obtain identity-related evidence will gain nothing by violating a suspect's constitutional rights . . .." *Farias-Gonzales*, 556 F.3d at 1189. Further, the suppression of any physical evidence obtained in an illegal search will continue to deter police officers from violating the Fourth Amendment, even if this Court holds that knowledge of identity cannot be suppressed.

The constitutional question presented here is not only an important one – on which the federal circuits are split – but it is also one that is likely to reoccur, as evidenced by the number of cases across the country dealing with it, especially in situations where an illegal stop leads to discovery of an arrest warrant. This Court should grant certiorari to resolve the ongoing debate over the proper reading of *Lopez-Mendoza* and the application of the exclusionary rule to knowledge of identity.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Dated: December 24, 2009

Respectfully submitted,

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This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2008).

STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1255

State of Minnesota, Respondent,

vs.

Danon Jason Russell, Appellant.

Filed July 21, 2009
Reversed
Halbrooks, Judge

Ramsey County District Court

File No. 62-K6-07-003492

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

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Considered and decided by Halbrooks, Presiding Judge; Toussaint, Chief Judge; and Willis, Judge.*

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant Danon Russell challenges the district court's refusal to suppress the evidence against him, arguing that (1) the police unlawfully seized him and (2) a witness's statement was insufficient to establish probable cause to support the search warrant that permitted the police to obtain a sample of his DNA. Because we conclude that appellant was not lawfully seized, we reverse.

FACTS

Officers Robert Buth and Trygve Sand of the St. Paul Police Department routinely patrol the city's East District. When not responding to a call, Officers Buth and Sand regularly drive by a list of addresses that they have identified as "problem properties" or "high-crime areas" that have yielded "numerous arrests in the past." The residence at 853 York Avenue East (the York house) is one of these addresses. The resident there, M.P., was known to Officer Buth as a person involved in the scrap-metal trade and a sometime copper thief. Officer Buth had been to the York house at least 20 times during the preceding one-and-a-half years that M.P. had lived there. The visits had resulted in the recovery of approximately five stolen vehicles and approximately ten arrests for outstanding warrants, auto theft, and drug-related crimes.

On August 4, 2006, at about 3:30 p.m., Officers Buth and Sand, who were uniformed and in a marked squad car, drove by the York house. They approached the house from the alley and observed M.P. with two white males and one black male. The men with M.P. were unknown to the officers. About 20 seconds after the officers and the men were visible to each other, the three unidentified men walked quickly into the York house. Officer Buth testified that he "wouldn't say [the men] ran." Officer Buth did not observe the men alert each other to the police arrival, attempt to conceal anything from the police officers, or conduct any hand-to-hand transactions.

The officers called M.P. over to their squad car and inquired as to who the other three men were. M.P. identified one of the white males as "Morrison" and the black male as "D." M.P. was unable to give a name for the other white male. While the officers were talking to M.P., the unidentified white male came out of the house by a side door and began walking toward the front of the house. The officers drove around the block to the front of the York house and saw that the male had taken a small canvas bag from a vehicle parked in front and was walking back toward the house. The officers stopped the man, searched the bag, and found what appeared to be "a meth kit." The officers arrested the man, who was identified as Benjamin Danielski.

Officer Buth then approached the house to identify the other two men. By the front gate, Officer Buth encountered the black male whom M.P. had identified only as "D." Officer Buth testified that D knew the officers were there, because he had likely been watching

the officers arrest Danielski and was standing outside the house. The man did not try to flee or evade the officer. Officer Buth grabbed D by the arm, which the officer testified was his normal practice "only to avoid a foot chase." Other than D's presence at the York house, Officer Buth said he had no specific information tying D to Danielski or to drug activity. Officer Buth asked D what his name, age, and date of birth were. D said his name was "Treyvon," that he was 22, and that he was born in July 1982. D's response made Officer Buth suspicious because he thought the nickname "D" would correspond to a first name that started with that letter and because the given birth date would make him 24, not 22. The officer handcuffed D and escorted him to the squad car. At that point, D admitted that his real identity was Danon Jason Russell and that there were outstanding warrants for his arrest.

The officers also sought to determine who owned the vehicle from which Danielski had presumably retrieved the meth kit. Danielski said that he had recently purchased the vehicle but did not have documentation, so Officer Buth decided to have the vehicle towed. The officers first performed an inventory search and found a handgun in a duffel bag in the trunk.

The next day, Danielski gave a recorded statement in which he stated he had seen the handgun in appellant's possession before. Based on Danielski's statement, as well as the initial encounter at the York house, the police applied for and received a search warrant to collect a sample of appellant's DNA for

comparison to the DNA obtained from the handgun. Appellant's DNA was determined to be a match to the DNA recovered from the handgun.

Appellant was charged with possession of a firearm by an ineligible person, in violation of Minn. Stat. § 624.713, subd. 1(b) (2006). He moved to suppress the evidence against him on the grounds that (1) he was unlawfully seized and (2) the search warrant used to obtain his DNA was not supported by probable cause. The district court denied the motion, and a jury convicted appellant. This appeal follows.

DECISION

A. The seizure was unlawful.

On appeal from a reasonable-suspicion determination supporting a seizure, we review the district court's findings of fact for clear error, but review its ultimate determination de novo. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). And when reviewing an order on a motion to suppress evidence, we "may independently review the facts and determine, as a matter of law, whether the district court erred." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

Both the United States and Minnesota constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The state constitution affords Minnesotans greater protection in this area than the federal constitution. *State v. Askerooth*, 681 N.W.2d 353, 361–63 (Minn. 2004)

(discussing cases in which the supreme court determined Minn. Const. art. I, § 10 afforded greater protection). Under the Minnesota Constitution, police officers "must be able to articulate reasonable suspicion justifying [a] seizure, [or] else any evidence that is the fruit of the seizure is suppressible." *In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993). Reasonable suspicion is "not the product of mere whim, caprice or idle curiosity, but [is] based upon specific and articulable facts." *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996) (quotation omitted).

A person's mere presence in a high-crime area or mere association with a known criminal is insufficient to establish reasonable suspicion. *State v. Varnado*, 582 N.W.2d 886, 890 (Minn. 1998); *see also E.D.J.*, 502 N.W.2d at 780, 783 (rejecting reasonable suspicion based on presence near a location known for criminal activity). But a person's evasive conduct around police, especially when coupled with his presence in a high-crime area, can create reasonable suspicion. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992). In *Dickerson*, the suspect left a known crack house walking in one direction but abruptly changed direction after making eye contact with police officers who were in a nearby squad car. *Id.* at 842.

Here, the district court identified the York house as a high-crime area and cited two facts as evidence of appellant's evasive conduct: that he "was observed immediately going inside" the York house when the officers drove up and that he emerged once Danielski, carrying the meth kit, had been arrested.

Appellant challenges the district court's characterization of his behavior as evasive conduct.[1] Although appellant did go inside the house almost immediately upon the police officers' arrival, there is no evidence that anyone in the group signaled the others that the police were near. Nor did appellant run inside; he merely walked quickly. And appellant did not attempt to conceal anything from the officers as he went inside. The officers saw Danielski leave the building while they were talking to M.P., but they did not see appellant leave. And when Danielski was being arrested in front of the house, appellant did not try to leave from the back. Instead, he stood outside and watched the arrest take place. When Officer Buth approached appellant, appellant did not try to flee. Neither in comparison to Dickerson, nor in light of the common understanding of the meaning of the word "evasive,"[2] is this evasive conduct that supports a determination of reasonable suspicion.

Officer Buth offered no other basis for his seizure of appellant. The district court therefore erred as a matter of law in determining that the seizure was lawful.

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[1] Appellant also questions the determination that the York house is a high-crime area. But whether a location is in a high-crime area is not dispositive; the inquiry focuses on whether the suspect engages in evasive conduct. Dickerson, 481 N.W.2d at 843.

[2] The root verb "evade" means to "escape or avoid by cleverness or deceit." *The American Heritage Dictionary of the English Language* 634 (3d ed. 1992).

No 09-781

In the
SUPREME COURT OF THE UNITED STATES

State of Minnesota, *Petitioner,*

v

Danon Jason Russell, *Respondent*

On Petition for a Writ of Certiorari to the
Court of Appeals of the State of Minnesota

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

Respondent, Danon Jason Russell, respectfully submits the following brief in opposition to the petition for writ of certiorari filed in the above-named matter. This Court should deny the petition for at least three reasons. First, the Minnesota Court of Appeals' decision is grounded on independent state law, second, the core of petitioner's argument would require this Court to act as an error-correcting court and renders irrelevant the analysis of this Court's decision in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), and third, the Minnesota Court of Appeals correctly interpreted this Court's decision in *Lopez-Mendoza*. For these reasons, this case is not a proper or effective vehicle for addressing the split of authority on the application of *Lopez-Mendoza*, and this Court should deny the certiorari petition.

I. THE PETITION FOR WRIT OF CERTIORARI DOES NOT MEET THIS COURT'S STANDARDS FOR GRANTING REVIEW BECAUSE THE MINNESOTA COURT OF APPEALS' DECISION IS GROUNDED ON INDEPENDENT STATE LAW AND BECAUSE PETITIONER IS ASKING THIS COURT TO CORRECT THE MINNESOTA COURT OF APPEALS' ALLEGED ERROR IN A DECISION THAT IS NOT PRECEDENTIAL.

In an unpublished opinion, over which the Minnesota Supreme Court denied review, the Minnesota Court of Appeals concluded that the district court erred in refusing to suppress respondent's statement, which included his true name, the police obtained after unlawfully seized him. Pet. App., 8-9.[1] The court analyzed respondent's statement just as it would any other piece of evidence the police obtained as a result of an unlawful seizure and determined the evidence must be suppressed as fruit of the unlawful seizure.

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[1] "Pet. App." denotes petitioner's appendix.

Id In reaching this decision, the court also recognized that this Court's decision in *Lopez-Mendoza* "simply restates a long-standing legal principle unlawful police activity does not affect the court's jurisdiction or require dismissal of the prosecution, but unlawful police activity may affect the admissibility of evidence " *Id* at 10

A. Because the Minnesota Court of Appeals' Decision Is Grounded on Independent State Law, This Court Lacks Jurisdiction and Therefore Any Decision Would be Advisory Only.

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment " *Coleman v Thompson* 501 U S 722, 729 (1991) (citations omitted) "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory " *Id* (citation omitted)

Petitioner urges this Court to grant review because of the federal circuit-court division on the interpretation and application of *Lopez-Mendoza* The Minnesota Court of Appeals' decision, however, was not premised on *Lopez-Mendoza* Instead, the court applied clearly established *state* law to determine whether the district court erred in refusing to suppress evidence the police obtained as a result of an unlawful seizure, specifically, respondent's statement, which included his true name The court began its analysis by determining whether the police unlawfully seized respondent, recognizing that Minnesota's constitution affords greater protection against unreasonable searches and seizures than does the federal constitution Pet App , 5-6 Applying state law, the

court determined that the police unlawfully seized respondent Pet App , 5-7 Then, the court again applied clearly established state law and determined that the district court erred in refusing to suppress the evidence (i e , respondent's statement) the police acquired after unlawfully seizing him [2] Pet App , 8-11 The court referenced *Lopez-Mendoza* only to clarify that it was not ruling on suppression of respondent's identity, it merely was ruling on suppression of his statement As the court explained, "[T]he state mischaracterizes what [respondent] sought to suppress His motion to the district court sought to suppress his statement of identification made after the arrest, not his identity itself This is an important distinction, as *Lopez-Mendoza* bears out " Pet App , 9

The Minnesota Court of Appeals' decision did not deny the district court jurisdiction over respondent Instead, the court's decision simply denied petitioner the ability to use *evidence* the police obtained unlawfully Because the court s decision was grounded on clearly established state law relating to suppression of evidence following an unlawful police seizure, there is no federal-law issue for this Court to decide Therefore, in compliance with the clear-statement rule and this Court's policy to avoid issuing advisory opinions, this Court should deny the certiorari petition *See Michigan v Long*, 463 U S 1032, 1041 (1983) (recognizing that given Court's policy to avoid advisory opinions, Court generally declines to decide issues when state court has clearly stated that its judgment is based on state grounds), *Herb v Pitcairn*, 324 U S 117, 126 (1945)

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[2] The Minnesota Court of Appeals relied on *State v Bergerson*, 659 N W 2d 791 (Minn App 2003), to analyze whether respondent's statement was the fruit of the unlawful seizure The court also relied on *State v Hardy*, 577 N W 2d 212 (Minn 1998), to identify the purpose of the exclusionary rule, which is to deter police misconduct

(recognizing if same judgment would be rendered by state court after this Court corrected federal-law issues, Court's review is nothing more than advisory opinion)

B. Petitioner Is Asking This Court to Act as an Error-Correcting Court on an Issue That Does Not Require This Court to Address *Lopez-Mendoza*.

Petitioner argues that the court of appeals' interpretation of *Lopez-Mendoza* is flawed because

> the officers' stop of [respondent] did not yield any evidence to be used against him The state has never attempted to introduce any physical evidence obtained at the time of the stop or the substance of any statements [respondent] made [3] The probable-cause portion of the search warrant that yielded [respondent's] DNA does not contain any evidence obtained from the stop [4]

Petition, 5 [5] Petitioner also urges this Court to remand this case back to the court of appeals if this Court rules in petitioner's favor on the suppression issue Petition, 3 n 1 Petitioner's assertions reveal the real issue petitioner wants this Court to address Was the Minnesota Court of Appeals' decision error because the court failed to determine whether, regardless of the suppression of respondent's statement, there is still probable cause to support the search warrant?

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[3] This assertion is not accurate At trial, one of the arresting officers testified that respondent initially gave the officers a false name and date of birth before providing them with his true name and date of birth Resp App , 1-5 The state used this testimony against respondent in closing argument Resp App , 6

[4] As demonstrated more fully on page 6 of this brief, this assertion is not accurate

[5] "Petition" denotes the certiorari petition

The core of respondent's argument is that probable cause for the search warrant did not depend on respondent's statement.[6] This argument, however, renders irrelevant any need for this Court to address *Lopez-Mendoza*. That is, under petitioner's theory, whether the probable cause supports the search warrant does not depend on this Court's – or any court's – analysis of *Lopez-Mendoza* because the probable cause has nothing to do with respondent's statement or his identity. This means that analysis of *Lopez-Mendoza* is not dispositive of this case. Therefore, if this Court grants review, this Court merely would be acting as an error-correcting court on the probable-cause issue and issuing an advisory opinion on the *Lopez-Mendoza* issue.

Because the Minnesota Court of Appeals applied independent, state law in concluding that the district court erred in refusing to suppress the evidence of respondent s statement and because the foundation of petitioner's argument in the certiorari petition does not provide this Court with a tangible opportunity to address *Lopez-Mendoza*, petitioner has not articulated compelling reasons for this Court to grant review of an unpublished opinion from the Minnesota Court of Appeals that carries no precedential weight for future cases in Minnesota. *See* Sup. Ct. R. 10 (instructing Court will only grant review on certiorari for compelling reasons); Minn. Stat. § 480A.08, subd. 3 (2008) (instructing court of appeals' unpublished opinions are not precedential).

[6] Petitioner also implies that respondent's outstanding warrant dissipated any taint of the unlawful seizure. Petition, 6. Petitioner, however, neither raised nor briefed this argument in the Minnesota Court of Appeals.

II. THE MINNESOTA COURT OF APPEALS CORRECTLY RECOGNIZED THAT *LOPEZ-MENDOZA* DOES NOT ALLOW A DEFENDANT TO CHALLENGE A COURT'S JURISDICTION EVEN IF THE COURT ACQUIRED JURISDICTION ONLY BECAUSE LAW ENFORCEMENT UNLAWFULLY OBTAINED EVIDENCE OF THE DEFENDANT'S IDENTITY.

The evidence suppressed in this case was respondent's unlawfully obtained statement, which included his true name. Petitioner maintains that the statement is not suppressible because petitioner classifies respondent's statement as identity, not evidence. In support of petitioner's classification, petitioner asserts that "[t]he probable-cause portion of the search warrant that yielded [respondent's] DNA does not contain any evidence obtained from the stop." Petition, 5. This assertion is not accurate. The probable-cause portion of the search-warrant application does, in fact, reference respondent's statement he made after the police unlawfully seized him. The officer who applied for the search warrant attested that the arresting officers had detained respondent and asked for his name. Resp. App. 7.[7] The officer also attested that respondent gave the arresting officers a false name and date of birth before providing them with his true name. *Id.* These facts demonstrate that the police relied on respondent's unlawfully obtained statement as evidence to help them acquire the search warrant for respondent's DNA.

Petitioner also defends its argument that respondent's statement is identity that is not suppressible by relying on this Court's instruction in *Lopez-Mendoza* that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest." 468 U.S. at 1039 (citations omitted).

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[7] "Resp. App." denotes respondent's appendix.

Petitioner notes that the federal circuit courts of appeals are split on whether *Lopez-Mendoza* means that 1) identity and identity-related evidence the police obtained unlawfully is never suppressible or 2) a defendant is precluded from challenging a court's jurisdiction over him even if the court acquired jurisdiction solely because the police unlawfully obtained evidence of a defendant's identity

Regardless of the federal circuit-court split on interpreting *Lopez-Mendoza*, the Minnesota Court of Appeals correctly concluded that *Lopez-Mendoza* applied to jurisdiction, not to unlawfully obtained evidence That interpretation is grounded on the caselaw this Court relied on in *Lopez-Mendoza* when instructing that the body or identity of a defendant is never suppressible The caselaw this Court cited relates solely to the question of jurisdiction *Lopez-Mendoza*, 468 U S at 1039-40 For example, in *Gerstein v Pugh*, this Court concluded that a defendant's unlawful arrest or detention does not void a subsequent conviction *Gerstein v Pugh*, 420 U S 103, 119 (1975) This Court reached a similar conclusion in *Frisbie v Collins*, instructing "the power of a court to try a person for [a] crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction '" *Frisbie v Collins*, 342 U S 519, 522 (1952) (footnote omitted), *see also United States ex rel Bilokumsky v Tod*, 263 U S 149, 158 (1923) (concluding deportation proceeding not void merely because police lacked probable cause to arrest defendant)

In further support of this Court's instruction that the body or identity of a defendant is never suppressible, this Court in *Lopez-Mendoza* relied on a line of cases involving forfeiture proceedings, all of which instructed that a forfeiture proceeding is

valid even if law enforcement obtained the contraband or property through unlawful means *Lopez-Mendoza*, 468 U S at 1040 (citing *United States v Eighty-Eight Thousand Five Hundred Dollars*, 671 F 2d 293, 296-97 (8th Cir 1982), *United States v One (1) 1971 Harley-Davidson Motorcycle*, 508 F 2d 351, 351 (9th Cir 1982), *United States v One 1965 Buick*, 397 F 2d 782, 784 (6th Cir 1968))

Even more instructive is how this Court applied the prior decisions in *Gerstein*, *Frisbie*, and *Tod* to the facts of *Lopez-Mendoza* Both respondent Lopez-Mendoza and respondent Sandoval-Sanchez challenged their deportation orders on the ground that immigration officials unlawfully arrested them *Lopez-Mendoza*, 468 U S 1034 The Ninth Circuit Court of Appeals vacated and remanded Lopez-Mendoza's deportation order to determine whether his Fourth Amendment rights had been violated *Id* at 1034-35 The Ninth Circuit reversed Sandoval-Sanchez's deportation order because his admission that he was in this country unlawfully was the fruit of an unlawful arrest *Id* at 1034

This Court reversed the Ninth Circuit's decision regarding Lopez-Mendoza precisely because Lopez-Mendoza did not challenge any evidence the immigration officials obtained during his unlawful arrest *Lopez-Mendoza*, 468 U S at 1040 Instead, Lopez-Mendoza merely moved to terminate the deportation proceedings because he was arrested unlawfully *Id* at 1035, 1040 That is, this Court applied the prior decisions of *Gerstein*, *Frisbie*, and *Tod* and reversed the Ninth Circuit's decision because Lopez-Mendoza only challenged the immigration court's *jurisdiction* over him

In contrast, Sandoval-Sanchez did challenge the evidence the immigration officials obtained from his unlawful arrest *Id* at 1040 The facts of Sandoval-Sanchez's case raised the true issue this Court addressed in *Lopez-Mendoza* Whether the exclusionary rule should apply to civil deportation proceedings when immigration officers, as they had done in Sandoval-Sanchez's case, obtained evidence only by unlawfully arresting someone *Id* at 1040-1050 This Court ultimately concluded that the "balance between costs and benefits comes out against applying the exclusionary rule " *Id* at 1050

Unlike Lopez-Mendoza, respondent in this case did not challenge the district court's jurisdiction over him because the police unlawfully seized him In fact, respondent specifically clarified that he was not challenging jurisdiction Instead, much like Sandoval-Sanchez, respondent only challenged the statement (i e the evidence) the police obtained as a result of the unlawful seizure Therefore, the Minnesota Court of Appeals correctly articulated the application of *Lopez-Mendoza* to criminal proceedings A defendant may not challenge jurisdiction following an unlawful arrest, but he may challenge identity-related evidence the police obtained only because of the unlawful arrest Pet App , 10

In *Lopez-Mendoza*, the question presented was whether the exclusionary rule should apply to civil deportation proceedings 468 U S at 1040-41 This Court acknowledged "[t]he general rule in a criminal proceeding is that statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated " *Id* (citing *Wong Sun v United States*, 371 U S 471, 487-88 (1963)) Applying this general rule, it is clear

that the evidence the immigration officials obtained by unlawfully seizing Sandoval-Sanchez would have been governed by the exclusionary rule had he challenged the evidence in a criminal proceeding This is precisely the set of facts this Court is presented with respondent moved to suppress his statement the police obtained by unlawfully seizing him The police relied on this evidence, in part, to acquire a search warrant for respondent's DNA Because the Minnesota Court of Appeals faithfully followed the distinction this Court made in *Lopez-Mendoza* between challenging identity to deny a court's jurisdiction and challenging the prosecution's ability to use unlawfully obtained identity-related evidence, the court's unpublished opinion with no precedential authority is not a proper or effective vehicle for this Court to address the federal circuit-court split regarding *Lopez-Mendoza* For these reasons, this Court should deny the certiorari petition

CONCLUSION

For the reasons stated herein, this Court should deny the petition for writ of certiorari.

Dated March 11, 2010

Respectfully submitted,

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IN THE

Supreme Court of the United States

STATE OF MINNESOTA,
Petitioner,

v.

DANON JASON RUSSELL,
Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of Minnesota

REPLY TO BRIEF IN OPPOSITION

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Respondent acknowledges the "split of authority on the application of *Lopez-Mendoza*." Brief in Opposition ("BIO") 1. He nonetheless argues at length that the Minnesota Court of Appeals correctly concluded that *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984), does not preclude suppression of illegally-obtained knowledge of identity. BIO 6-10. But this argument is not relevant to his meritless assertion that "this case is not a proper or effective vehicle for addressing" the split among the federal circuits. BIO 1.

Respondent makes two claims why this case is not appropriate for resolving the "meaning of the *Lopez-Mendoza* 'identity statement' [that] has bedeviled and divided" the circuits.[1] First, respondent argues that the court of appeals' decision is grounded on independent state law. BIO 2-4. He is wrong. The court of appeals cited state law to support its finding that the seizure here was illegal, and for the general proposition that illegally obtained evidence should be suppressed. Appendix to Petition for Writ of Certiorari ("App") 5-8. But petitioner neither seeks review of the finding that the seizure was illegal, nor challenges the general proposition that the exclusionary rule applies to illegally obtained evidence. Petitioner's argument is that under *Lopez-Mendoza*, knowledge of identity is not suppressible "evidence." On this issue, the court of appeals relied solely on federal law. App 9-11. Importantly, the court did not cite any state law purportedly trumping *Lopez-Mendoza*; it simply concluded

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[1] *United States v. Oscar-Torres*, 507 F.3d 224, 228 (4th Cir. 2007).

that the proper reading of *Lopez-Mendoza* is that "illegal police activity does not affect the court's jurisdiction" but knowledge of identity nevertheless is subject to suppression. App 10-11.[2]

Respondent's second argument is not clear. He asserts that petitioner is asking this Court to act as an error-correcting court. Respondent is correct, in the sense that petitioner is asking this Court to correct the court of appeals' erroneous reading of *Lopez-Mendoza*, and thereby resolve the circuit split over that case's "identity statement." Petitioner is not, however, asking this Court to correct a factual or state-law error on probable cause. BIO 4-5. As noted in the cert petition, whether there was probable cause for the search warrant is an issue the court of appeals did not reach – and on which remand would be appropriate – because of its conclusion that knowledge of identity should have been suppressed, which would have rendered the warrant targetless and therefore invalid. App 11. While it is possible, though unlikely,

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[2] Although the court of appeals used the phrase "evidence of identity," its conclusion makes clear that it is suppressing knowledge of identity. App 11. It orders suppression of the DNA obtained with the search warrant, because "[a] warrant cannot issue without identifying its target," and police knowledge of the identity of the warrant's target (respondent) came from the illegal seizure. In other words, the court of appeals concluded that the search warrant was improperly issued because a search warrant must include a name, and the police only learned respondent's name because of an illegal stop. Id. The court of appeals did *not* hold the warrant invalid because illegally obtained "evidence of identity" was included in the probable-cause portion of the warrant. Id. at 8-11. The court only addressed the source of police knowledge of respondent's identity, which was necessary for issuance of the warrant. Id.

that respondent will prevail on the probable-cause issue if this case is remanded, that does not make this case an inappropriate vehicle for resolving the meaning of the *Lopez-Mendoza* "identity statement." [3]

Finally, a brief comment on the merits: respondent essentially argues this Court did not really mean what it said in *Lopez-Mendoza* – that the "identity of a defendant ... in a criminal ... proceeding is never itself suppressible as a fruit of an unlawful arrest ..." 468 U.S. at 1039. While some courts have agreed with respondent's argument, many have not, which is why this important question should be resolved by this Court.

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[3] It is unlikely that respondent will prevail on the probable-cause issue, if this case is remanded, because the test for probable cause is easily met by the eye-witness's statement that he saw respondent handling the seized gun. App 4. This is the substantive evidence the state relied on in the search-warrant application (as opposed to the facts included in the application for context). Appendix to BIO 10. Similarly, the substantive (not background) evidence the state used to convict respondent of illegal possession of this gun is the DNA found on it, which *matches* respondent's DNA. App 4 5. Lastly, petitioner does not argue that respondent had an outstanding warrant and this "dissipated any taint of the unlawful seizure." BIO 5 n.6. Petitioner's argument is that "arrest-warrant cases illustrate the principle that knowledge of identity is not subject to suppression." Petition 6.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Dated: March 19, 2010

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